Pointers for Practicing before the Honorable Gregory L. Frost,

United States District Court for the Southern District of Ohio

Shawn Judge
Law Clerk to the Honorable Gregory L. Frost

The following non-exhaustive list of practice pointers targets procedural and professional errors that occur on a regular basis on the docket of the Honorable Gregory L. Frost. These pointers suggest the preferred–and in some instances, the mandated–practice for counsel and parties. The list does not constitute a standing order of the Court and should be regarded only as advisory in nature. Current copies of the Local Civil and Criminal Rules of the United States Court for the Southern District of Ohio can be obtained via the Court's website: http://www.ohsd.uscourts.gov/locrules.htm

- **Extensions of Time**
  - **Pleadings**
    - Parties can stipulate to extensions of time "not to exceed a total of twenty (20) days in which to file a motion or any responsive pleading." S.D. Ohio Civ. R. 6.1(a). A pleading is defined as a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer. *See* Fed. R. Civ. P. 7(a); S.D. Ohio Civ. R. 6.1(b).
    - File the stipulation with the Clerk of Court. Do not submit the stipulation to Judge Frost or to an assigned Magistrate Judge.
    - For pleading-related extensions beyond twenty days, or when a stipulation cannot be reached, a party must obtain permission from the Court.
  - **Case Schedule Deadlines**
    - In seeking to extend a deadline, pay attention to S.D. Ohio Civ. R. 6.1. A party must file a motion to extend deadlines for everything but pleading-related filings. A stipulated extension is invalid and will likely be struck. A joint motion is proper; an agreed order is not.
  - **Motion Deadlines**
    - A party seeking to extend the memorandum in opposition or reply

deadline must file a motion with the Court. S.D. Ohio Civ. R. 6.1(b).

- Do not wait until the last minute to seek an extension. Filing for an extension on the day a response is due does not engender goodwill and does not imply professionalism.

- **Dismissals**

  - **Of entire case.** A plaintiff cannot voluntarily dismiss a case after an answer has been filed simply by filing a notice of dismissal. Rather, a plaintiff should file either an appropriately signed stipulation of dismissal under Fed. R. Civ. P. 41(a)(1)(ii) or move the Court for an order of dismissal under Fed. R. Civ. P. 41(a)(2). Note that Fed. R. Civ. P. 41(a)(1)(ii) requires "a stipulation of dismissal signed by all parties who have appeared in the action."

  - **Of individual party.** The Sixth Circuit has suggested, without conclusively deciding the issue, that dismissal of all claims against a single defendant should be pursuant to Fed. R. Civ. P. 21. *See Letherer v. Alger Group, L.L.C.*, 328 F.3d 262, 265-66 (6th Cir. 2003).

  - **Of less than all claims.** The Sixth Circuit recognized in *Letherer* a previous holding from that court that Fed. R. Civ. P. 41 is confined to the dismissal of only an entire *action* and that it cannot provide a mechanism through which select *claims* can be dismissed. *Id.* at 266. The *Letherer* court also recognized both that the court of appeals has been inconsistent in applying this rule and that at least five other circuits have interpreted Fed. R. Civ. P. 41 less restrictively. *Id.* at 266 n.2. But although appearing to question the narrow interpretation of Fed. R. Civ. P. 41, the *Letherer* court did not resolve the issue; the district courts must adhere to precedent precluding the piecemeal dismissal of claims by stipulation. Two potential dismissal mechanisms in these circumstances exist in a Fed. R. Civ. P. 15 amendment to the complaint that would dismiss a claim or claims or a Rule 16 pre-trial order dismissing a select claim or select claims.

  - **Retention of post-dismissal jurisdiction to enforce settlement agreement.** Keep in mind that "a district court retains jurisdiction to enforce a settlement agreement if it either (1) has language in the dismissal order indicating its retention of jurisdiction, or (2) incorporates the terms of the settlement agreement into the dismissal order." *Hehl v. City of Avon Lake*, 90 Fed. Appx. 797, 801 (6th Cir. 2004). Absent such language, a court will lack subject matter jurisdiction after dismissal.

- **Deposition Transcripts**

  - **Signature of court reporter required.** An unsigned certification by a court reporter can preclude consideration of a deposition transcript. For example, an unsigned certification means that a filed transcript fails to qualify as proper summary judgment evidence under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 30(f)(1); *cf. Soliday v. Miami County, Ohio*, No. C-3-91-153, 1993 WL 1377511, at *5 n.4 (S.D. Ohio 1993) (stating that "the Court cannot consider" deposition testimony referenced in summary judgment reply memorandum but not filed with court); *Moore v. Florida Bank of Commerce*, 654 F. Supp. 38, 41 n.2 (S.D. Ohio 1986) (unauthenticated deposition not filed with court is not proper material under Rule 56); *Podlesnick v. Airborne Express, Inc.*, 550 F. Supp. 906, 910 (S.D. Ohio 1982) (depositions not filed with court but referred to in summary judgment memoranda were not considered in court's decision). *See also Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002) (discussing unauthenticated deposition extracts).

    - **Party's waiver not binding on court.** Note that Fed. R. Civ. P. 32(d)(4) indicates that a party can waive "[e]rrors and irregularities" related to depositions, including certifications, if that party fails to attack a defect "with reasonable promptness after such defect is, or with due diligence might have been, ascertained." But that rule targets only the parties and not the Court. In other words, the fact that a defendant has waived the right to attack a deposition transcript neither compels a district court to consider the transcript in contravention of Fed. R. Civ. P. 56(e) nor constrains the court from properly excluding the transcript *sua sponte* as invalid summary judgment evidence.

    - **Nonreproducable court reporter signatures.** Note the recent emergence of a certification by court reporters that reads as follows: "This certification bears an original signature in nonreproducible ink. The foregoing certification of the transcript does not apply to any reproduction of the same not bearing the signature of the certifying court reporter. [The court reporter] disclaims responsibility for any alterations which may have been made to the noncertified copies of this transcript." Counsel who fail to catch this certification may be filing copies of certifications that appear to be unsigned and thus invalid.

  - **Signature of deponent.** Federal Rule of Civil Procedure 30(e) targets the signing of a deposition transcript by a deponent. Note that the failure to submit this signature to a court does not constitute the same quality of defect described above.

- **Default Judgment**

  - **Two-step procedure is different than procedures in Ohio state courts.** A plaintiff seeking default judgment in a federal court must first obtain an entry of default as contemplated by Fed. R. Civ. P. 55(a). An entry of default is distinct from entry of a default judgment. *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 353 (6th Cir. 2003); *see also* 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2692 (3rd ed. 2003); S.D. Ohio Civ. R. 55.1(b). By asking *only* for a default judgment, a plaintiff would fail to follow the sequential procedure set forth in the Rule. *See Brantley v. Runyon*, No. C-1-96-842, 1997 WL 373739, at *1 (S.D. Ohio June 19, 1997) ("In order to obtain a default judgment under Rule 55(b)(2), there must first be an entry of default as provided by Rule 55(a)."). *See also Webster Indus., Inc. v. Northwood Doors, Inc.*, 244 F. Supp. 2d 998, 1003 (N.D. Iowa 2003) (" 'entry of default under Rule 55(a) must precede grant of a default judgment under Rule 55(b)' ") (quoting *Hayek v. Big Brothers/Big Sisters of America*, 198 F.R.D. 518, 520 (N.D. Iowa 2001); *Lee v. Brotherhood of Maint. of Way Employees–Burlington N. Sys. Fed'n*, 139 F.R.D. 376, 380 (D. Minnesota 1991) ("an entry of default is a prerequisite to a default judgment under Rule 55(b)"). Only after issuance of an entry of default under Fed. R. Civ. P. 55(a) will a court then enter a default judgment under Fed. R. Civ. P. 55(b). *Cf. O.J. Distrib., Inc.*, 340 F.3d . at 352 (" 'Rule 55 permits the clerk to enter a default when a party fails to defend an action as required. The court may *then* enter default judgment.' " (Emphasis added)) (quoting *Weiss v. St. Paul Fire and Marine Ins. Co.*, 283 F.3d 790, 794 (6th Cir. 2002)).

  - **Plaintiff's failure to pursue default judgment.** Pursuant to S.D. Ohio Civ. R. 55.1(a), a plaintiff who can properly seek an entry of default by the Clerk, but who fails to do so, risks a show cause order and possible dismissal for failure to prosecute. Similarly, under S.D. Ohio Civ. R. 55.1(b), a plaintiff who delays in seeking a default judgment after obtaining an entry of default risks a show cause order and possible dismissal for failure to prosecute.

- **Contacting Chambers**

  - **Chambers line:** 614.719.3300
  - **Chambers Facsimile:** 614.719.3305
  - **Even-numbered cases:** Shawn Judge, 614.719.3303
  - **Odd-numbered cases:** Aimee Hathaway, 614.719.3302
  - **Courtroom Deputy:** Scott Miller, 614.719.3014

  - ***Ex parte* communications.** This is not a big problem, but–especially when counsel repeatedly appears before the Court and gets to know Chambers

staff–there is often the temptation to adopt too casual a manner when discussing a case with the staff.

- **Pre-judging of motions.** Do not ask what a judge will decide *if* you file a motion. The court is not in the business of issuing advisory decisions on what an actual decision of the court would be.

- **Timing of decision.** Do not call chambers asking when something will be released.

- **Law school associates.** Do not have associates who are not on a case call a law clerk with whom they went to law school to seek "inside" information or ask for an extension. This does not work, it is annoying, and it is unethical.

- **Miscellaneous Points**

  - **Accelerating Motions Practice.** The Court, pursuant to its inherent authority and S.D. Ohio Civ. R. 1.1(c), can modify the filing deadlines set forth in S.D. Ohio Civ. R. 7.2(a)(2) in any given case. A party seeking a time-sensitive decision that would be frustrated by the standard response periods should assert in his or her initial motion a request for truncated response times.

  - **Abuse of TROs**

    - Too many attorneys use them as a way of getting to the merits early.

    - Don't fabricate emergency situations.

  - **Abuse of sanctions**

    - **Exercise restraint in seeking sanctions.** Many counsel routinely make motions for sanctions, especially in regard to discovery disputes. This is a trigger that once pulled cannot be stopped in terms of its potential effect on the civility of the litigation. Attorneys who habitually seek sanctions based on slight or nonexistent infractions risk building an unfavorable reputation and incurring skeptical consideration by a wary judge.

  - **Non-oral hearings**

    - **Definition.** A non-oral hearing is a case-tracking mechanism in which Judge Frost sets a specific date on which the case file is picked up. Counsel need not attend the "hearing," because there is no actual hearing. Rather, this is the date on which Judge Frost seeks to begin addressing the

pending motion(s) that necessitated the hearing date. As a general guideline, Judge Frost seeks to issue a decision within three months of the non-oral hearing; as a practical reality, Judge Frost often issues a decision in several weeks after the non-oral hearing date. The foregoing timeline is subject to potentially conflicting deadlines in other cases and the trial schedule, so counsel should keep in mind when asking for extensions the court's scheduling practices and the need for the court to provide itself with adequate time to complete its work.

- **Filing under seal**

  - Parties often seek to file under seal material that does necessitate such secrecy. Don't use filing under seal as a strategic maneuver designed to inconvenience the opposing party.

- **Electronic filing**

  - Electronic filing is not mandatory at this time, but it is encouraged.

  - For more information: http://www.ohsd.uscourts.gov/cmecf.htm

  - Courtesy copies dropped off to chambers are appreciated when lengthy motions or motions with voluminous attachment are filed.

- **Standing Orders**

  - To learn various trial-related deadlines and courtroom procedures, counsel should consult a judge's relevant standing order(s) well in advance of a scheduled trial date. An example copy of Judge Frost's current standing order for civil jury trials is attached. Counsel can obtain this order, as well as the standing orders of each judge in the Southern District, at the following website: http://www.ohsd.uscourts.gov

TRIAL PROCEDURE FOR CIVIL JURY TRIAL

JUDGE GREGORY L. FROST
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

INTRODUCTION

A lawsuit in which you represent a party, or in which you are a party, has been assigned to me for trial. You will want to know what is expected of you and your opponent. The following procedures are designed to deal with your case promptly and efficiently without impeding your ability to present your case fully and fairly. Throughout these instructions, whenever the term "counsel" is used, it refers both to attorneys and to those parties representing themselves.

COUNSEL TABLES

The parties will occupy the counsel table chosen or agreed to before the opening of the first session of the trial. The parties and all counsel will be present at counsel tables at all sessions before the Judge enters the courtroom. The parties and all counsel will remain at counsel tables until after the jury leaves the courtroom at the end of all sessions. The parties and counsel will stand upon the entrance and exit of the jury.

APPEARANCES

Counsel will enter their appearance with the court reporter and the courtroom deputy before the start of the opening session of the trial.

COURT SESSIONS

Trials will be held on Monday through Friday of each week. Thursday morning sessions may be shortened or canceled because the Court regularly schedules final pretrial conferences and criminal matters on that day. Counsel should inquire regarding Thursday's schedule.

Morning session begins at 9:00 a.m. and will recess at approximately 10:30 a.m. for 15 minutes.

Noon recess will be at approximately 12:00.

Afternoon session begins at 1:00 p.m. and will recess at approximately 3:15 p.m. for 15 minutes.

Court will adjourn at approximately 5:00 p.m.

ADDRESSES BY COUNSEL

Counsel will address the Court and the jury in the following manner:

(a) Voir dire examination, opening statements and closing arguments will be conducted from the lectern facing the jury;

(b) All addresses to the Court will be made from the lectern facing the Court; and

(c) Counsel shall stand when addressing the Court for any other reason.

EXAMINATION OF WITNESSES

Counsel shall conduct their examination from the lectern.

In advance of trial, counsel will instruct his or her witnesses to answer questions with courtesy. Evasive answers, answering a question with a question or disrespect to opposing counsel will not be permitted.

Counsel are expected to extend equal courtesy to all witnesses. Counsel will wait until the witness has finished an answer before asking the next question. Multiple part questions and repetitious questions will not be permitted. Counsel may not by any action, inflection or expression indicate disbelief of any witness's answer. Counsel shall admonish their clients and witnesses to desist from such conduct.

Witnesses shall be treated with fairness and consideration. They shall not be shouted at, ridiculed or otherwise abused. The untruthful or hostile witness can be examined firmly and extensively without abuse.

When a party has more than one attorney, only one may conduct the direct or cross-examination of a given witness, and only that attorney may raise objections.

Counsel need not ask permission of the Court before approaching a witness.

During examination of a witness, counsel will first obtain permission of the Court if he or she wishes to confer with co-counsel.

Upon completing his or her examination of the witness, counsel shall advise the Court, after which the Court will advise opposing counsel to proceed.

OBJECTIONS

Counsel will stand when making an objection and will make the objection directly and only to the Court.

When objecting, state only that you are objecting and if requested by the Court state the grounds. Objections shall not be used for the purpose of making speeches, repeating testimony, or to attempt to guide a witness or influence the jury.

Argument upon an objection will not be heard unless permission is given or argument is requested by the Court. Either counsel may request a bench conference.

DECORUM

Colloquy, or argument between counsel shall not be permitted. All remarks shall be addressed to the Court.

Counsel shall maintain a professional and dignified atmosphere throughout the trial.

Appearance, mannerisms, or habits that are designed to arouse the sympathy or prejudice of the jury are an impediment to an impartial trial and will not be permitted.

During a trial, counsel shall not exhibit familiarity with witnesses, jurors or opposing counsel and shall avoid the use of first names. No juror shall be addressed individually or by name.
During opening statements and final arguments, all persons at counsel table shall remain seated and be respectful so as not to divert the attention of the Court or the jury.

Do not ask the court reporter to mark testimony. All requests for re-reading of questions or answers shall be addressed to the Court.

EXHIBITS

Counsel will mark all exhibits prior to the commencement of trial. Plaintiff's exhibits will bear the letter prefix P followed by Arabic numerals ("P-1") and Defendant's exhibits will bear the prefix D followed by Arabic numerals ("D-1"). Joint exhibits will bear the prefix JE followed by Arabic numerals ("JE-1"). Third party exhibits will bear the prefix TP followed by Arabic numerals ("TP-1"). In cases involving multiple parties (*e.g.*, two or more plaintiffs or defendants), the parties shall confer with the Court at the final pretrial conference regarding the designation of prefixes.

Counsel shall provide a list of all exhibits and copies of all the exhibits to the Court, the courtroom deputy, the law clerk, and opposing counsel one week prior to trial.

Counsel will approach the witness to tender an exhibit.

In formulating a question to a witness dealing with an exhibit, counsel shall specify the exhibit number/letter designation so that the record will be clear.

Counsel shall tender exhibits produced for the first time during trial, as in the case of exhibits used for impeachment, to the courtroom deputy for marking and shall then display the exhibits to opposing counsel.

When exhibits are admitted, they shall be given to the courtroom deputy and he shall retain them. Until admitted, the exhibits are the responsibility of the party offering them.

DEPOSITIONS

Counsel will confer in advance of trial and attempt to resolve objections by agreement. If any objections remain for ruling, counsel shall jointly prepare a list of objections identifying the page number and line(s) of the deposition where the objection will be found and stating in one sentence the grounds for the objection. This procedure applies to both written and video tape depositions. Thus video tape depositions which contain objections must be accompanied by a full or partial transcript. The jointly prepared list of objections and grounds for the same shall be delivered to the Court prior to the commencement of trial.

Video tape presentation must include a method for editing the sound to delete testimony as to which the Court has sustained an objection.

DEMONSTRATIVE EVIDENCE

Counsel shall exhibit to opposing counsel any sketches, models, diagrams, or other demonstrative evidence of any kind that will be used during the trial, or that are prepared solely for the purposes of opening or closing argument, prior to their use.

Counsel must supply his/her own easel, flip charts, etc. for trial.

JURY

The Court usually will seat a jury of ten members. In accordance with Fed. R. Civ. P. 48, all jurors shall participate in the verdict unless excused pursuant to Rule 47(c). Unless the parties otherwise stipulate, the verdict shall be unanimous and no verdict shall be taken from a jury reduced in size to fewer than six members.

VOIR DIRE EXAMINATION

Each prospective juror is assigned a number by the Clerk's Office. Counsel will be provided with a list of the jurors' names and numbers prior to the commencement of trial.

The prospective jurors will be seated in numerical order, with ten prospective jurors seated in the jury box and the remaining prospective jurors seated in the gallery.

The Court will conduct a comprehensive voir dire examination tailored to the issues in the case being tried. Counsel may supplement the Court's examination, but they may not repeat in the same or in some other form any question already put to the panel by the Court. Counsel must address their questions to the whole panel in general and may not question an individual juror unless it develops from a question put to the whole panel that the answer of a specific juror justifies further inquiry. In questioning an individual juror, counsel shall refer to that juror by number only.

Counsel will not be permitted to question jurors individually regarding background information. This information is contained in juror questionnaire forms which are on file in the Clerk's Office. Counsel should examine these questionnaires prior to the commencement of trial. Counsel may inquire regarding any omission in a juror's answer to the juror questionnaire or, after obtaining the Court's permission, regarding any inquiry justifiably elicited by information contained in the juror questionnaire.

The whole panel of prospective jurors (*i.e.*, those in the jury box and those seated in the rear of the courtroom) will be examined before the Court will entertain challenges for cause or peremptory challenges.

CHALLENGES FOR CAUSE

Counsel will present challenges for cause for the entire panel (*i.e.*, jurors seated in the jury box and in the rear of the courtroom) to the Court at sidebar and on the record. Counsel shall refer to a prospective juror by name and number.

When any of the ten prospective jurors seated in the jury box are excused for cause, he or she will be replaced by the next juror, based on numerical order, seated in the gallery. The unexcused prospective juror will proceed from the gallery and take the seat of the excused juror in the jury box.

PEREMPTORY CHALLENGES

Once the Court has ruled on all challenges for cause, the Court will entertain peremptory challenges. Counsel will present peremptory challenges to the Court at sidebar and on the record. Counsel shall refer to a prospective juror by name and number.

The parties will exercise their peremptory challenges alternately with the plaintiff exercising the first challenge. Counsel should note that each party shall be entitled to three peremptory challenges. 28 U.S.C. § 1870. "Passing" on a peremptory challenge constitutes using that challenge.

Peremptory challenges will be directed only to the prospective jurors seated in the jury box. When any of the ten prospective jurors seated in the jury box are excused by peremptory challenge, he or she will be replaced by the next juror, based on numerical order, seated in

the gallery. The unexcused prospective juror will proceed from the gallery and take the seat of the excused juror in the jury box. This process will continue until all peremptory challenges are exercised.

MOTIONS IN LIMINE

Motions in limine, including those that address the admissibility of expert testimony under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), shall be filed three weeks prior to the final pretrial conference. Responses to motions in limine shall be filed one week prior to the final pretrial conference.

JURY INSTRUCTIONS

Requests for jury instructions should be filed one week before the scheduled trial date. Requests should be delivered directly to the Court or its law clerk. All proposed jury instructions shall be submitted in hard copy and on 3.5" diskettes in WordPerfect 10 for Windows. Copies shall be served on opposing counsel.

SUMMARY OF DEADLINES

Three weeks before the final pretrial conference, counsel for Plaintiff and Defendant are responsible for submitting to the Court copies of motions in limine. Responses to motions in limine are due one week before the final pretrial conference.

One week before the trial date, counsel for the government and Defendant are responsible for submitting to the Court copies of the following:

(a) Exhibits;
(b) List of exhibits; and
(c) Proposed jury instructions.

IT IS SO ORDERED.

GREGORY L. FROST
UNITED STATES DISTRICT JUDGE